

SEC Waives Key Provision of Rule in Granting Latest Whistleblower Award and Rulemaking Petition Seeks Clarifications on Private Agreements and Anti-Retaliation

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The latest [SEC award](#) to a whistleblower was notable for having been initially denied because the SEC decided that the information was not “voluntarily” provided. Under the SEC rules, a submission is not being made voluntarily if a request, inquiry or demand related to the subject matter is directed to the whistleblower by the SEC, PCAOB or any self-regulatory organization (SRO) or in connection with an investigation by federal or state authorities.

In this situation, the SEC’s preliminary determination found that although the claimant provided original information that led to a successful enforcement action, that information was not “voluntarily” provided as required because of a prior inquiry into the matter conducted by an SRO. The SEC ultimately waived this requirement, however, after reviewing the response that the claimant filed, including a detailed description of the claimant’s efforts to correct and to bring the misconduct to light internally.

The claimant’s persistent, though futile, efforts to fix the problem through internal channels appeared to influence the SEC. It appears that the claimant tried diligently to get appropriate personnel to pay attention to the securities law violations several times. An SRO inquiry originated from information that a third party provided to the SRO that in part described the claimant’s role in identifying the issue that gave rise to the violations. The claimant was led to believe that all of the materials that he or she had developed had been provided to the SRO, but once the SRO inquiry was closed, the claimant went to the SEC because of concerns that the violations had not been addressed.

This claimant is one of 6,500 people from at least 68 countries who have offered confidential information under the SEC whistleblower program, according to information the *WSJ* [obtained](#) through a Freedom of Information Act request. Nearly 3,600 list a job title, but retirees were the largest group of those with complaints, followed by investors, and surprisingly, engineers. All of this effort has led to five cases from eight whistleblowers, amounting to more than \$15 million in payments (\$14 million was given to one person).

In the midst of public interest in the SEC whistleblower program, a former assistant director in the Division of Enforcement has submitted a [rulemaking petition](#) on behalf of a group of attorneys and advocates for whistleblowers. The petition requests clarification with respect to the scope of private agreements, including employment, severance and confidentiality agreements, that purport to limit employees as whistleblowers, citing to a recent court case in which a company requiring employees that were interviewed during the course of an internal compliance investigation to sign confidentiality agreements that prohibited them from discussing the interviews or the subject matter with anyone, including government officials. Other documents that the petition believes are questionable include provisions that require employees to notify companies prior to any communications with the SEC and those that mandate representations from employees that they have not shared confidential information with anyone, including government agencies. As the petition notes, these provisions may be in corporate codes of conduct as well as contracts.

The petition also urges the Commission to resolve the uncertainty, through a policy statement, regarding the extent to whether the anti-retaliation employment protections under Dodd-Frank extend to employees who have reported possible violations to their employers but not the SEC, since some courts have concluded that only direct communications with the SEC staff can give rise to an actionable Dodd-Frank retaliation claim. The proposed policy statement would educate

individuals about the current case law, but also warn companies against retaliation.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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